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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-10502

SHAHLA POURGHOLAM,

Plaintiff – Appellant

V.

ADVANCED TELEMARKETING CORPORATION, doing business as Aegis Communications Group Inc.,

Defendant – Appellee

Appeals from the United States District Court
for the Northern District of Texas, Dallas

ORDER:

IT IS ORDERED that appellant's motion for an extension of 20-30 days to file sufficient petition for rehearing en banc is DENIED.

IT IS FURTHER ORDERED that Appellant's motion for leave to amend Appellant's petition for rehearing en banc is DENIED.

IT IS FURTHER ORDERED that Appellant's motion for leave to amend Appellant's petition for rehearing en banc is DENIED.

IT IS FURTHER ORDERED that Appellant's petition for rehearing en banc filed March 1, 2006 is stricken for non-compliance with Local Rule 35.

IT IS FURTHER ORDERED that henceforth the clerk of Court shall not accept for filing any pleadings for documents submitted by or on behalf of appellant.

Dated: March 17th, 2006.

/s/ Jacques Wiener

JACUES L. WIENER, Jr.
UNITED STATES CIRCUIT JUDGE

Mot-21

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-10502

SHAHLA POURGHOLAM,

Plaintiff – Appellant

V.

ADVANCED TELEMARKETING CORPORATION, doing business as Aegis Communications Group Inc.,

Defendant – Appellee

Appeals from the United States District Court
for the Northern District of Texas, Dallas

O R D E R:

IT IS ORDERED that Appellant's motion to file petition for panel rehearing en banc out of time is GRANTED.

Dated: 03/01/2006. /s/ Jacques Wiener

JACUES L. WIENER, Jr.
UNITED STATES CIRCUIT JUDGE

Mot-21

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-10502

SHAHLA POURGHOLAM,

Plaintiff – Appellant

V.

ADVANCED TELEMARKETING CORPORATION, doing business as Aegis Communications Group Inc.,

Defendant – Appellee

Appeals from the United States District Court
for the Northern District of Texas, Dallas
(3: 01-CV-2764-H)

Before KING, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Shahla Pourgholam, proceeding pro se, appeals myriad rulings of the district court, including summary judgment dismissals of some of claims and dismissal of others based on a jury verdict unfavorable to Pourgholam. The plethora of claims advanced by

Pourgholam against Defendant-Appellee Advanced Telemarketing Corporation ("ATC") may be broadly categorized as workplace or employment discrimination involving, variously, harassment, hostile work environment, supervisor harassment complaints, retaliation, and on and on, implicating national origin, race and sex. We have patiently waded through Pourgholam's multifarious allegations, conclusion statements, and largely contradicted assertions; and we have carefully reviewed the many rulings of the district court, whether evidentiary, summary judgment, or the like. In the end, we are convinced that the district court committed no reversible error in any of its dispositions of the issues presented.

Moreover, our combing of the record on appeal and our review of the applicable law, as presented in the brief of ATC on appeal and on the basis of our own independent research, convinces us beyond peradventure that – separate and apart from her filing and prosecution of this action in the district court- Pourgholam's appeal to this court is wholly lacking in merit and thus is frivolous as a matter of law. But for Pourgholam's pro se status, we might well have addressed the issue of sanctions for a frivolous appeal on our own motion. Pourgholam is cautioned that any further prolongation of this contumacious litigation could expose her to sanctions.

APPEAL DISMISSED. Dated: February 7th, 2006.

Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

TEL. 504-310-7700
CHARLES R. FULBRUGE III 600 CAMPT STREET
CLERK NEW ORLEANS, LA 70130

January 11, 2006

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 05-10502 Pourgholam V. Adv Telemarketing
USDC No. 03:01-CV-2764-H

The court had granted the motion of appellant for leave to file corrected reply brief in this case.

Sincerely,

CHARLES R. FULBURCE III, Clerk

/s/ Mary Stewart
BY: _____
Mary Stewart, Deputy Clerk
504-310-7694

IN THE UNITED STATES DISTRUCT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHAHLA POURGHOLAM	*	
	*	
Plaintiff	*	
		Civil No. 3:01-CV 2764
	*	
V.	*	
	*	
ADVANCED TELEMARKETING CORP., d/b/a AEGIS COMMUNICATIONS GROUP, INC.	*	

JUDGMENT

This case was tried before the court and a jury March 21, 22, and 23, 2005. On March 24, 2005, the jury returned its verdict pursuant to which this judgment is entered.

IT IS ORDERED, ADJUDGED AND DECREED by the court that Plaintiff Shahla Pourgholam take nothing by her suit against Defendant advanced Telemarketing corp. d/b/a Aegis Communications Group, Inc., and that this suit be, and it is hereby, **DISMISSED** on the merits at Plaintiff's cost.

SIGNED this 24th day of March, 2005.

/s/ Barefoot Sanders

BARFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

NORTHERN DISTRICT OF TEXAS
IN THE UNITED STATES DISTRUCT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHAHLA POURGHOLAM	*	
	*	
Plaintiff	*	
		Civil No. 3:01-CV 2764
	*	
V.	*	
	*	
ADVANCED TELEMARKETING	*	
CORP., d/b/a AEGIS	*	
COMMUNICATIONS GROUP,	*	
INC.	*	

ORDER

ON March 17, 2005, the Court held a pre-trial conference with the parties to discuss pending matters. The Court's rulings follow.

Defendant's objections to Plaintiff's exhibits 3,4,5,6, and 64 are **SUSTAINED.**[1] Plaintiff's exhibits 3,4,5,6, and 64 are not admitted. With the exception of exhibits 3-6, and 79 – 86, all of Plaintiff's remaining exhibits are admitted. Exhibits 79 – 86 may be admitted for impeachment purposes.

---

[1] AT THE CONFERENCE, Defendant withdrew its remaining objections to Plaintiff's exhibits.

Plaintiff's objections to Defendant's exhibits 32, 42, and 118 are **SUSTAINED**. Defendant's exhibit 29 is **OVERRULED.** With the exception of exhibits 32, 42, and 118, all of Defendant's exhibits are admitted.

With respect to Defendant's Motion in Limine, filed February 15, 2005, Defendant's Motion is **GRANTED** in part and **DENIED** in part. Having considered the Motion and the parties' oral argument at the pre-trial conference, Defendant's Motion is **GRANTED** as to any evidence of:

(1) Darryl Steen's May 1, 1980 conviction for passing a worthless check between $20 and $200;
(2) Darryl Steen's May 31, 1980 conviction for sexual assault of a child under the age of seventeen;
(3) Other lawsuits, administrative complaints, or allegations of discrimination or harassment asserted by other employees against Aegis;
(4) D'Jana Williams' July 19, 996 conviction for passing a worthless check under $20; and
(5) Settlement negotiations or offers to compromise between the parties.

With respect to evidence of Darryl Steen's November 13, 1986, conviction for aggravated sexual assault of a child the age of under fourteen, Defendant's Motion is **DENIED** with the following modification: the fact of the Darryl Steen's November 13, 1986, felony conviction may be introduced; however the nature of the charge may not be mentioned.

SO ORDERED.

Dated: March 18, 2005.

/s/ Barefoot Sanders

BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

NORTHERN DISTRICT OF TEXAS
IN THE UNITED STATES DISTRUCT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHAHLA POURGHOLAM *
*
Plaintiff *
Civil No. 3:01-CV 2764
*
V. *
*
ADVANCED TELEMARKETING*
CORP., d/b/a AEGIS *
COMMUNICATIONS GROUP, *
INC. *

ORDER

Pursuant to the District Court's orders of reference came on to be heard several motions filed by the parties in this action and having considered the relevant pleadings and the statements of counsel for the parties the court finds and orders as follows:

1. Plaintiff's motions to quash filed on December 20th, 2004 and January 3rd, "20205" ("2005"), respectively. Each motion relates to subpoenas duces tecum which have been served by Defendant or third parties. Plaintiff's motion to quash will be denied.

2. Defendant's motion for permission to continue Plaintiff's deposition filed on December 13, 2004. Defendant previously took Plaintiff's deposition at a time when she was preceding pro se and prior to the time that she had produced or authorized the release of relevant medical records. Under such circumstances the court finds that Defendant's motion to continue Plaintiff's deposition should be granted, but limited to questions relating to her physical and mental health as reflected in her medical records.

3. Plaintiff's motion to compel filed on January 3, 2005. Previously the District Court granted Plaintiff's request to depose Darryl Steen and David Walker, who were employed by Defendant at the time of the incidents alleged in Plaintiff's complaint. In its order filed November 17, 2004, the District Court ordered Defendant to produce documents from "Steena's"("Steen") and Walker's personnel files to include copies of any reports with respect to background checks. No background checks were produced at the time of these individuals' depositions, nor has Defendant provided such records as of the present date, although Defendant's counsel represents that it is continuing to review files and records in an effort to locate such documents. The court is of the opinion that Plaintiff is entitled to either production of the background check documents relating to Steen and Walker or a formal written response which conforms to the requirements of Rule 34 stating that Defendant has no such records presently in its possession.

IT IS, THEREFORE, ORDERED that Plaintiff's motion to quash the subpoenas duces tecum which Defendant served on Foley's Department Store, "Spring" ("Sprint") Communications, North Lake College of Dallas County, U.S. Vision, Manpower, Wal-Mart, Las Colinas Medical Center and Parkland Health and Hospital System is denied.

IT IS FURTHER ORDERED that any documents produced by any third-party identified in the proceeding paragraph will be copied and provided to Plaintiff's counsel and that any documents produced in response to the subpoenas ducs tecum will be used solely in the prosecution and defense of this action and will not be disclosed to any third parties except by agreement of counsel or on the further order of the court.

IT IS FURTHER ORDERED that Defendant's motion for permission to continue Plaintiff's deposition is granted in part to the extent that Defendant will be permitted to question Plaintiff further on matters which relate to her past and present medical condition for up to three hours of questioning and answers by Defendant's counsel. Unless otherwise agreed to continuation of Plaintiff's deposition will take place at her attorney's offices on a date and time to be agreed upon by counsel.

IT IS FURTHER ORDERED that Plaintiff's motion to compel is granted and that on or before February 21, 2005, Defendant will either produce copies of documents which pertain to its background checks on Darryl Steen and David Walker or, in the event that such document relating to either

Steen or Walker, or both, are not in Defendant's possession, Defendant will serve a formal written response stating that such documents are not in its possession.

A copy of this order shall be transmitted to counsel for the parties.

SIGNED this 10th day of January 2005.

/s/ Wm Sanderson

WILLIAM SANDERSON
UNITED STATES MAGISTRAE JUDGE

NORTHERN DISTRICT OF TEXAS
IN THE UNITED STATES DISTRUCT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHAHLA POURGHOLAM	*	
	*	
Plaintiff	*	
		Civil No. 3:01-CV 2764
	*	
V.	*	
	*	
ADVANCED TELEMARKETING	*	
CORP., d/b/a AEGIS	*	
COMMUNICATIONS GROUP,	*	
INC.	*	

MEMORANDUM OPINION AND ORDER

Before the Court are Defendant's Motion for Summary Judgment, filed February 25, 2004; Plaintiff's Response to Defendant's Motion for summary Judgment, filed April 30, 2004; Plaintiff's Affidavit, filed April 30, 2004; and Defendant's Reply in support of its Motion for Summary Judgment, filed May 17, 2004. for the following reasons, Defendant's motion for summary judgment is **GRANTED in part and DENIED in part.**

I. Background

Plaintiff is a woman of Iranian descent, whom Defendant employed as a customer service representative and, for a time, as a supervisor. Plaintiff worked for Defendant from February 24, 1999, until her discharge on September 27, 2201. (D.'s App. At 273, 300a). On October 19, 2001, Plaintiff filed a charge of discrimination with Equal Employment Opportunity Commission ("EEOC"), alleging supervisory sexual harassment and discriminatory discharge. (D.'s App. At99; P.'s App. At Ex 8.). Specifically, Plaintiff alleged that Defendant discharged her due to her national origin and in retaliation for complaining about the sexual harassment. (Id.) The EEOC issued Plaintiff a right to sue notice on October 23, 2001. (D.'s App. at 10-11). On December21, 2001, Plaintiff brought suit in this Court alleging various forms of discrimination and harassment in violation of Title VII and the Techs Commission on Human Rights Act ("TCHRA"). (D.'s App. at 2, 5-8). Plaintiff also asserts a claim for intentional infliction of emotional distress. (Id. at 8-9). Defendant now moves for summary judgment on all claims.

II. Summary Judgment Standard

Summary Judgment is appropriate where the facts and law as represented in the pleadings, affidavits, and other summary judgment evidence show that no reasonable trier of fact could find for the nonmoving party as to any material fact. FED. R. CIV. P. 56; *Lujan v. Nat'l wildlife Fed'n, 497* U.S. 871, 888 (1990); *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 251 (1986); *Celotex Corp. v. Cartrett*, 477 U.S. 317, 323, 323-25 (1986); *innovative Database Sys. V. Morales*, 990 F.2d 217 (5th Cir 1993). "The nonmoving party bears the initial burden of identifying those portions of the pleadings and discovery in the record that believes demonstrate the absence of a genuine issue of material fact, but is not required to negate elements of the nonmoving party's case." *Lynch Props., Inc. v. Potomac Ins. Co. of Ill.*, 140 F. 3d 622, 625 (5th Cir. 1998)*(*citing *Celotex, 477 U.S. at 322-25*). If the movant fails to meet its initial burden, the motion must be denied, regardless of the nonmovant's response. *Little v. Liquid Air Corp.*, 37 F. 3d 1069, 1075 (5th Cir. 1994).

If the movant does meet its burden, the nonmovant must go beyond the pleading and designate specific facts showing that a genuine issue of material fact exists for trial. *Matsusjita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Edwards v. Your Credit, Inc.*, 148 f.3d 427, 431 (5th Cir. 1998). A party opposing summary judgment may not rest on mere conclusory allegation or denials in its pleadings unsupported by specific facts presented in affidavits opposing the motion for summary judgment. FED. R. CIV. P 56(e); *Lujan*, 497 U.S. at 888; *Hightower v. Texas Hosp. Ass'n* 65 F.3d 433, 477 (5th Cir 1995).

In determining whether genuine issues of facts exist, "[f]actual controversies are constructed in the light most favorable to the nonmovant, but only if if both parties have introduced evidence showing that a controversy exist." *Lynch*, 140 f.3d at 625; *see also Eastman Kodak v. Image*

Technical Servs., 504 U.S. 451 (1992). However, in the absence of any proof, the Court will not assume that nonmoving party could or would prove the necessary facts. *Lynch*, 140 F.3d at 625. A party must do more than simply show some "metaphysical doubt as to material facts". *Matsushita*, 475 U.S. at 586. "If the record, taken as a whole, could not lead a rational trier of fact Co., 948 F.2d 972, 974 (5th Cir. 1991).

III. Analysis

At various points in the history of this case, Plaintiff has asserted the following causes of action against Defendant: (1) harassment based on national origin; (2) harassment based on race; (3) supervisory sexual harassment; (4) co-worker sexual harassment; (5) discriminatory failure to promote based on national origin; (6)discriminatory demotion based on national origin; (7)discriminatory suspension based on national origin; (8)discriminatory demotion based on national origin; (9)discriminatory discharge based on national origin; (10) discriminatory discharge based on race; (11) retaliation for engaging in a protected activity; and (12) intentional infliction of emotional distress. In her response, Plaintiff withdraws her cause of action for discriminatory demotion based on her national origin. (P.'s Resp. at 1, 5). Because all of the remaining causes of action-with the exception of intentional infliction of emotional distress arise under Title VII, TCHRA, or both, Plaintiff must demonstrate that she has exhausted her administrative remedies as to those causes of action. *See Taylor v. Brooks A Million, Inc.*, 296 F.3D 376, 379 (5th Cir.

2002)(holding that title VII "[[e]xhaustion occurs when the plaintiff files a timely charge with the EEOC and receives a statutory notice of right to sue" and that the filing of a charge with EEOC is not a jurisdictional prerequisite but a precondition to filing suit in federal court); *M.D. Anderson Hospital and Tumor Institute v. Willrich*, 28 S.W. 3d 22, 24 (Tex. 2000)(holding that Texas Legislature intended to correlate state law with federal law in employment discrimination cases). Accordingly, the court will visit the issue of exhaustion before turning to the merits of the claims that are properly before this Court.

A. Exhausion

As noted above, Plaintiff filed a charge of discrimination with the EEOC on October 19, 2001, alleging that her supervisor sexually harassed her and that Defendant discharged her due to her national origin and in retaliation for complaining about the sexual harassment. (D.'s App.at99; P.'s App. at Ex.8.). Thus, Plaintiff's charge of discrimination is limited to a charge of supervisory sexual harassment, discriminatory discharge based on national origin, and retaliation for engaging in a protected activity. The Court concludes that Plaintiff's remaining Title VII and TCHRA causes of action are outside the scope of the EEOC investigation that could have reasonably expected to grow out of Plaintiff's charge of discrimination. *See Thomas v. Texas Dep't of Criminal Justice*, 220 F.3d 389, 395 (5th Cir. 2000). Accordingly, Plaintiff's causes of action for harassment based on national origin, harassment based on race, co-worker sexual harassment, discriminatory failure to

promote based on national origin, discriminatory suspension based on race, and discriminatory discharge based on race are hereby **DISMISSED** for failure to exhaust administrative remedies.

The Court now turns to the merits of Plaintiff's remaining causes of action, i.e., supervisory sexual harassment, discriminatory discharge based on national origin, retaliation for engaging in a protected activity, and intentional infliction of emotional distress.

B. Supervisory Sexual Harassment

Plaintiff alleges that her Supervisor-Darryl Steen ("Steen")-sexually harassed her from May or June 2001 until her discharge on September 27, 2001, in violation of Title VII. Defendant moves for summary judgment on the grounds that (1) Plaintiff has presented no evidences that the supervisor's alleged conduct altered the terms of her employment, and (2) even if Plaintiff has presented sufficient evidence of supervisory sexual harassment, Plaintiff has not raised any genuine issue of material facts as to Defendant's entitlement to the affirmative defense outlined in *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998), *and Faragher v. City of Boca Raton,* 524 U.S. 775 (1998). (D.'s Br. At 10-13 n.4.)

In analyzing a supervisory sexual harassment claim, a court must first determine whether the plaintiff suffered a tangible employment action. *See Wyatt v. Hunt Plywood Co., Inc.*, 297 F. 3d 405, 409 (5th Cir. 2202). If so, the case is

classified as a quid pro quo case; if not, the case is classified as a hostile work environment case. *See Id. See also Handzlik v. United States*, 93 Fed.Appx. 15, 17 (15th Cir. 2004)(holding that there must be a nexus between the tangible employment action and the plaintiff's acceptance or rejection of [her] supervisor's alleged sexual harassment") (internal quotations omitted).

In hostile work environment cases, a plaintiff must show the following to establish supervisory sexual harassment:

(1) The employee belongs to a protected group;
(2) The employee was subjected to unwelcome sexual harassment;
(3) The harassment complained of was based on sex; [and]
(4) The harassment complained of affected a "term, condition or privilege of employment," i.e., the sexual harassment must be sufficiently severe or pervasive so as to alter the condition of employment and create an abusive working environment.

Watts v. Kroger Co., 170 F.3d 505, 509 (5th Cir. 1999). "[A] sexually objectionable environment must be both subjectively and objectively offensive, "considering the totality of the circumstances. Green v. Administrative of *Tulane Educational Fund*, 284 F. 3d 642, 655 (5th Cir. 2002). In examining whether a hostile work environment exists, the Court must look to "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or

humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Cain v. Blackwell*, 246 F.3d 758, 760 (5th cir. 2001)(citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)) (internal quotations omitted).

Once a plaintiff has established supervisory sexual harassment based on hostile work environment, an employer is vicariously liable unless the employer can establish both prongs of the *Ellerth/Faragher* affirmative defense. That affirmative defense requires:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

(b) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Watts, 170 F.3d at 509-10.

In the instant case, the summary judgment record contains the following evidence: affidavit and documentary evidence that Steen is a registered sex offender with two felony convictions for sexual offenses (P.'s at Ex 3; P's Aff. at 4); affidavit and documentary evidence that Defendant obtains background checks on prospective employees as a condition of employment (P.'s App. at Ex. 5; P.'s Aff. At 6-7); Plaintiff's affidavit statement that "[I]n May or June

2001, my immediate supervisor, Darryl Steen, sexually harassed me. Darryl Steen made offensive, abusive...and unwelcome advances upon me during this time which became condition of my employment" (P.'s Aff.at 3); Plaintiff's deposition testimony that Steen first sexually harassed her when he laid down on the ground and asked her to walk on his back (D.'s App. At 79, 81, 87); Plaintiff's deposition testimony that, on one occasion in May or June 2001 when they were the last two people at work, Steen pulled his van behind Plaintiff's car so that she could not leave and asked her to go to a motel with him and to get a drink with him (D.App. at 79-80); Plaintiff's deposition testimony that Steen asked her on several occasions to go to a motel with him (D.'s App. At 79-98); Plaintiff's deposition testimony that Steen told her that he wanted to move in with him and that he wanted to have group sex (D.'s App. At 79, 82, 98); Plaintiff's deposition testimony that Steen followed her during one of her breaks, walking very close behind her such that she had to tell him not to stand so close (D.'s App. At 80); Plaintiff's deposition testimony that Steen would often walk with her during her breaks and that, during on such walk, Steen told her that he wanted to grab her, put her on his lap, and spank her (D.'s App. At 3-4); Plaintiff's deposition testimony that on many occasions Steen threatened to shoot her in the head and kill her (D.'s App. At 79, 81, 82); Plaintiff's letter, dated September 27, 2001, to various managers in which she describes how Steen, along with others, discussed in Plaintiff's presence how to cut someone's throat from ear to ear, as well as how to shoot someone in the head such that the hole in the head would be bigger (P.'s App. At 6); Plaintiff's letter, dated September 27,

2001, to various managers in which she reports that Steen "Constantly talks about shooting people" (P.'s App. At Ex. 6); Plaintiff's deposition testimony that Steen would "take her off the system" because Plaintiff would not sleep with him (D.'s App. At 88); Plaintiff's affidavit statement that "I reported in May, June, July, August, and September 2001 the abusive, offensive, and discriminatory conduct of management to Lisa Lewis, Ella Dickerson, David Walker, Operation Manager. My complaints were ignored. No remedial action was ever taken to address my complaints" (P.'s Aff. At 4); Plaintiff's deposition testimony that she reported Steen's threats and sexual harassment to Lisa Lewis, telling Lewis "a little bit" about the harassment despite being scared to do so due to Steen's threat of killing her (D.'s App. at 82-83); a handwritten note, apparently by Lisa Lewis, referencing an investigation into Plaintiff's allegation of sexual harassment (D.'s App. at 425; Plaintiff's letter, dated September 27, 2001, to various managers referencing sexual harassment and accusing certain supervisors including Steen, of abusing her and stressing her out. (P.'s App. at Ex. 6); declaration of David Walker, Operations Manager, confirming that Steen became Plaintiff's supervisor in February 2001 and remained so until her discharge (D.'s App. at 624, 714); Plaintiff's deposition testimony that she did not sleep with Steen and that she believed he retaliated against her for that by discharging her (D.'s App. at 98); and Plaintiff's deposition testimony that, immediately after discharging her, Steen told her "that happens to people he fires, people who don't sleep with him" (D.'s App. at 78a).

The Court concludes that there are genuine issues of material fact as to whether Plaintiff suffered a tangible employment action because of Steen's alleged sexual harassment. The Court further concludes that there are genuine issues of material fact as to *quid pro quo sexual harassment* and as to hostile work environment, including Defendant's entitlement to the *Ellerth/Faragher* affirmative defense. Accordingly, Defendant's motion for summary judgment is **DENIED** as to supervisory sexual harassment.

C. Discriminatory Discharge (National Origin)

Plaintiff alleges that Defendant discharged her based on her national origin, Iranian, in violation of Title VII and TCHRA. Defendant moves for summary judgment on the grounds that (1) Plaintiff cannot establish a prima facie case of discriminatory discharge based on national origin, and (2) even if Plaintiff could establish a prima facie case, Plaintiff cannot establish that Defendant's legitimate, non-discriminatory reason for discharging Plaintiff amounted to pretext for national origin discrimination. (D.'s Br. At 20-22.)

The Court employs the same legal standards in analyzing discrimination claims under Title VII and TCHRA. See *M.D. Anderson Hospital and Tumor Institute v. Willrich,* 28 S.W. 3d 22, 24 (Tex. 2000) (holding that the Texas Legislature intended to correlate state law with federal law in employment discrimination cases). The Court evaluates discrimination claims that rely on circumstantial evidence by employing the burden-shifting approach announced in

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *See West v. Nabors Drilling USA, Inc.*, 330 F. 3d 379, 383 (5th Cir. 2003); *Long v. Eastfield College*, 88 F.3d 300, 304 (5th Cir. 1996) The Supreme Court developed this approach "to deal with cases in which discrimination can be proved only by circumstantial evidences."*Evans v. City of Houston*, 246 F.3d 344, 350 (5th cir. 2001) (citing *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133 (2000)).

Under the burden-shifting approach, a plaintiff is first required to establish a *prima facie* case of discrimination. See Meinecke v. H & R block of Houston, 66 F 3d 77, 83 (5th Cir. 1995). If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a "legitimate, non-discriminatory justification for its actions." Evans, 246 F.3d at 350. "If the defendant can articulate a reason that, if believed, would support a finding that the action was non-discriminatory, the mandatory inference discrimination created by the Plaintiff's *prima facie case* drops out of the picture and the fact finder must decide the ultimate question: whether the plaintiff has proved intentional discrimination." Id. (internal quotations omitted). In establishing this ultimate question, "the plaintiff can rely on evidences that the employer's reasons were a pretext for unlawful discrimination...,and the fact finder may still consider the evidences establishing plaintiff's prima facie case and inferences properly drawn therefore." *Id.*

To establish a *prima facie* case of discriminatory discharge based on national origin, a plaintiff must show (1) that she was a member of a protected class; (2) that she was

qualified for the position; (3) that she was discharged; and (4) [that] after she was discharged, she was replaced with a person who [was] not a member of the protected class" or that the employer acted in some other manner to indicate that the decision to discharge was based on national origin. *Framk v. Xerox Corp.*, 347 f. 3d 130, 137 (5th Cir. 2003); *Meinecke v. H & R Block of Houston*, 66 F. 3d 77, 83 (5th Cir. 1995).

In the instant case, there is no serious dispute that Plaintiff has satisfied the first three prongs of her prima facie case. However, the record is devoid of any competent summary judgment evidence that Defendant discharged Plaintiff due to her Iranian descent. Although the summary judgment record contains evidence that certain co-workers and customers made isolated comments that could be construed as derogatory and disrespectful of Plaintiff's national origin (D.'s App. at 45, 46a, 47, 51, 93), there is no evidence that those who actually discharged her did so because of her national origin. Most significantly for purpose of *prima facie* analysis, the summary judgment record contains no evidence as to the national origin of the person who replaced Plaintiff. Accordingly, Defendant's motion for summary judgment is **GRANTED** as to discriminatory discharge based on national origin.

D. ***Retaliation***

Plaintiff alleges that Defendant discharged her in retaliation for complaining about the supervisory sexual harassment, discussed above, in violation of Title VII.

Defendant moves for summary judgment on the grounds that (1) Plaintiff cannot establish a *prima facie* case of retaliation, and (2) even if Plaintiff could establish a *prima facie case*, Plaintiff cannot establish that Defendant legitimate, non-discriminatory reason for discharging Plaintiff amounted to pretext for retaliation. (D.'s Br. 23-24).

Title VII prohibits retaliation against an employee who engages in protected conduct, such as complaining about an unlawful employment practice. See 42 U. S. C. §2000e-3(a). To establish a prima facie case of retaliation, a plaintiff must show that (1) she engaged in a protected activity; (2)she suffered an adverse employment action; and (3) a "causal link existed between the protected activity and the adverse employment action." *Gee v. Principi*, 289 F. 3d 342, 345 (5th Cir. 2002).

In the instant case, the Court concludes that summary judgment record raises genuine issues of material fact as to Plaintiff's prima facie case of retaliation. Although the court recognizes that Defendant had presented evidence of legitimate, non-retaliatory reason for discharging Plaintiff, the Court further concludes that summary judgment record raises genuine issues of material fact as to pretext. Accordingly, Defendant's motion for summary judgment is **DENIED** as to retaliation for engaging in a protected activity.

E. Intentional Infliction of Emotional Distress

Finally, Plaintiff asserts a cause of action for intentional infliction of emotional distress under state law. Defendant moves for summary judgment on the ground that Defendant's alleged conduct is not sufficiently extreme or outrageous, as a matter of law, to support a claim for intentional infliction of emotional distress. (D.'s Br. At 24n.16.)

To prevail on a claim for intentional infliction of emotional distress, a plaintiff must establish that: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. See Benners v. Blanks Color Imaging, Inc., S.W. 3d -, 2004 Wl 937902, at *__ (Tex.App.-Dallas May 2, 2004) (no pet. h.). In the instant case, the summary judgment record contains no evidence of severe emotional distress. Accordingly, Defendant's motion for summary judgment is **GRANTED** as to intentional infliction of emotional distress.

IV. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment is **GRANTED in part** and **DENIED in part.** Specifically, Plaintiff's causes of action for harassment based on national origin, harassment based on race, co-worker sexual harassment, discriminatory failure to promote based on national origin, discriminatory suspension based on national origin, discriminatory suspension based on race, and discriminatory discharge based on race are hereby **DISMISSED** for failure to exhaust

administrative remedies. Defendant's motion for summary judgment is **GRANTED** as to Plaintiff's causes of action for discriminatory discharge based on national origin and intentional infliction of emotional distress. Finally, Defendant's motion for summary judgment is **DENIED** as to Plaintiff's supervisory sexual harassment and retaliation for engaging in a protected activity.

SO ORDERED.

Dated: June 9th, 2004.

/s/ Barefoot Sanders

BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORHTERN DISTRICT OF TEXAS

NORTHERN DISTRICT OF TEXAS
IN THE UNITED STATES DISTRUCT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SHAHLA POURGHOLAM	*	
	*	
Plaintiff	*	
		Civil No. 3:01-CV 2764
	*	
V.	*	
	*	
ADVANCED TELEMARKETING CORP., d/b/a AEGIS COMMUNICATIONS GROUP, INC.	*	

ORDER

Pursuant to the District Court's order of reference filed on June 26, 2002, on this date came on to be heard Defendant's motion to compel filed on June 25, 2002, and

IT IS ORDERED that Defendant's motion is granted as follows:

1. Plaintiff's objections to Defendant's discovery are overruled.

2. within fifteen (15) days of the date of this order Plaintiff will serve full and complete answers to Defendant's First Set of Interrogatories , but limited to the period of January 1, 1997, to the present.

3. Within fifteen (15) days of the date of this order Plaintiff will serve full and complete responses to Defendant's First Request for Production of Documents, but limited to the period of January 1, 1997, to the present. At the hearing Plaintiff informed the court that all documents responsive to Defendant's document request were in her possession in the courtroom. The court directed Plaintiff to provide the documents to Defendant's counsel at the conclusion of the hearing so that they could be copied and the originals be returned to Plaintiff. In responding to Defendant's requests Plaintiff is permitted to respond to an individual request that: "All documents called for in this request have been provided to Defendant's counsel" when appropriate. To the extent that Plaintiff has no documents responsive to a specific request she should respond that "Plaintiff has no documents responsive to this request."

IT IS FURTHER ORDERED that any information provided in answer to interrogatories 4, 6, 7, 10(d) and (e) and 12, and documents produced in response to Requests 3, 6, 7, 8 and 10 will not be disclosed to anyone other than the parties, their counsel and any expert retained by a party, except upon agreement of Plaintiff or on further order of the court.

The court further finds that Plaintiff's objections to Defendant's discovery were not substantially justified and

that other circumstances would not make an award of expenses unjust. Specifically the court notes that Defendant's counsel communicated with Plaintiff by letter and by telephone on a number of occasions in an effort to obtain the requested discovery, asserting non-meritorious objections to the same. The court further finds that Defendant incurred reasonable attorney' fees and expenses in the preparation, filing and presentation of its motion to compel in the amount of $1,200.00.

IT IS THEREFORE, ORDERED that Plaintiff will pay to Defendant the sum of $1,200.00 as sanctions. Because Plaintiff does not presently have funds available for payment of the sanctions the $1,200.00 will be deducted from any damages awarded to Plaintiff, if judgment is entered in Plaintiff's favor or will be deducted from any funds received from Defendant in settlement of this action, unless waived by Defendant.

A copy of this order shall be transmitted to Plaintiff and counsel for Defendant.

SIGNED this 17th day of July, 2002.

/s/ Wm Sanderson

WILLIAM SANDERSON
UNITED STATES MAGISTRATE JUDGE